No. 98554-5

IN THE WASHINGTON SUPREME COURT

In re the Dependency of

G.J.A., A.R.A., S.S.A., J.J.A., and V.A.,
Minor children

C.A. (mother),
Appellant

v.

Washington State Department of Children, Youth, and Families,
Respondent

AMICUS CURIAE BRIEF OF UNIVERSITY OF WASHINGTON TRIBAL COURT PUBLIC DEFENSE CLINIC AND LEGAL COUNSEL FOR YOUTH AND CHILDREN

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici curiae are set forth in the motion for leave to file brief of amicus curiae, filed contemporaneously with this brief.

INTRODUCTION

The Indian Child Welfare Act[1] ("ICWA") has been called the "gold standard" of child welfare because the core provisions intended to keep Indian families intact, particularly by way of mandating that families receive intensive efforts ("active efforts") to provide rehabilitative services and keep children safely in their homes. Congress, in passing ICWA, recognized the historical practice of removing Indian children without due process amid questionable allegations of child mistreatment, which were rooted in cultural biases and federal policies intended to threaten both the existence and sovereignty of Tribes. ICWA's protections include a heightened standard of service provision, achieved through a higher level of engagement undertaken by the filing agency, and concurrent strict enforcement by courts. The Washington State Legislature passed the

[1] 25 U.S.C. §§ 1901-1963

Washington Indian Child Welfare Act[2] ("WICWA") in 2011, which provided additional protections for Indian children in Washington.

Despite four decades of ICWA's protections, uniform implementation as intended by Congress has yet to be achieved. This case illustrates how judicially created exceptions to the mandate to provide "active efforts" undermine Congressional intent, while eroding protections guaranteed by ICWA. This practice threatens the well-being of Indian children and families, is contrary to Congressional intent, and should be rejected by this court.

ISSUE ADDRESSED BY AMICI CURIAE

Did the trial court err when it found that the State's failure to provide timely referrals would have been futile, thus improperly relieving the State of ICWA and WICWA's mandate to make active efforts to reunify the family?

ARGUMENT

A. THE PURPOSE OF ICWA IS TO PROTECT THE BEST INTEREST OF INDIAN CHILDREN AND TO PROMOTE THE STABILITY AND SECURITY OF INDIAN TRIBES AND FAMILIES, IN PART BY REQUIRING "ACTIVE EFFORTS" TO PREVENT THE BREAKUP OF THE INDIAN FAMILY.

[2] RCW 13.38

1. Congress passed ICWA in 1978 in response to finding that centuries of federal Indian policies and practices intended to break up Indian families and threaten the existence of tribes.

Congress enacted ICWA in 1978 to address the policies and practices that resulted in the "wholesale separation of Indian children from their families." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989); *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. (1974) https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf (hereinafter 1974 Senate Hearings). Congress found that an alarmingly high percentage of Indian families were broken up by the removal, often unwarranted, of their children by nontribal public and private agencies. 25 U.S.C. 1901(4). The four leading factors contributing to the high rates of Indian child removal were a lack of culturally competent State child-welfare standards for assessing the fitness of Indian families; systematic due-process violations against both Indian children and their parents during child-custody procedures; economic incentives favoring removal of Indian children from their families and communities; and social conditions in Indian country. H.R. Rep. No. 95–1386, at 10–12.

Congress also found that the higher rate of removal of Indian children arose as a result of State actions, including that the States, exercising their

recognized jurisdiction over Indian child-custody proceedings through administrative and judicial bodies, often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). State agencies and judges, unfamiliar with Indian communities and practices, applied Eurocentric socioeconomic values and practices in the child-welfare context that failed to account for the difference in family structure and child-rearing practice in Indian communities. H.R. Rep. No. 95–1386, at 10. Cultural bias compounded these failures, resulting, the House Report concluded, in unequal and incongruent application of child welfare standards for Indian families. *Id*.

State procedures for removing Indian children from their natural homes routinely violated due process. Rather than helping Indian parents correct parenting issues, or acknowledging that the alleged problems were the result of cultural and socioeconomic differences, social workers claimed removal was in the child's best interest. Moreover, State courts failed to protect the rights of Indian children and Indian parents. 1974 Senate Hearing at 62.

ICWA's intent, therefore, was to provide uniform protections for Indian children, while preserving and fostering Native communities. Cheyañna L. Jaffke, The "Existing Indian Family" Exception to the Indian

Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children, 66 La. L. Rev. 733, 735 (2006).

2. ICWA provided a variety of protections to Indian children, including the mandate that "active efforts" be made to prevent the breakup of the Indian family.

ICWA is often referred to as the "gold standard" of child welfare policy. *See, e.g.*, Brief for Casey Family Programs et al. as Amici Curiae p. 7, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013); National Council of Juvenile and Family Court Judges, INDIAN CHILD WELFARE ACT JUDICIAL BENCHBOOK, available at https://www.ncjfcj.org/wp-content/uploads/2018/09/NCJFCJ_ICWA_Judicial_Benchbook_Final_Web.pdf. (last accessed on December 22, 2020). Among the many protections guaranteed by ICWA is the mandate that the state agency make "active efforts" to prevent the breakup of the Indian family. 25 U.S.C. § 1912; RCW 13.38.040(1). The active efforts requirement is "designed *primarily* to ensure that services are provided that *would permit the Indian child to remain or be reunited with her parents*, whenever possible, and helps protect against unwarranted removals *by ensuring that parents who are, or may readily become, fit parents are provided with services necessary to retain or regain custody of their child*." BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, GUIDELINES FOR IMPLEMENTING

THE INDIAN CHILD WELFARE ACT 39 (Dec. 2016) (emphasis added) (hereinafter BIA GUIDELINES). The term "active efforts" creates an expectation of "a significantly increased level of engagement with parents/Indian custodians than that required by the 'reasonable efforts' standard so often employed in child welfare cases."[3] Tom Tremaine, *Indian Child Welfare Act*, *in* WASHINGTON STATE JUVENILE NON-OFFENDER BENCHBOOK ch. 29, § 8a (Stacey Lara ed., 2017), available at https://www.wacita.org/benchbook/chapter-29-indian-child-welfare-act/ (hereinafter BENCHBOOK).

Since ICWA's passage, however, state court decisions have undermined ICWA protections. *In re Dependency of Z.J.G.*, 196 Wn.2d 152, 169, 471 P.3d 853 (2020). For example, in 1992, this Court affirmed a lower court's judicially created exception to the application of ICWA when the court found that there was no "existing Indian family," even where the child met the statutory definition of "Indian child". *In re Adoption of Infant Boy Crews*, 118 Wn.2d 561, 835 P.2d 305 (1992), *overruled in part by In the Matter of the Adoption of T.A.W.*, 186 Wn.2d

[3] The "reasonable efforts" standard in cases involving non-Indian children was affirmed as appropriate by Congress with the passage of the Adoption Assistance and Child Welfare Act in 1980. Child Welfare Information Gateway, *Reasonable efforts to preserve or reunify families and achieve permanency for children.* Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau (2020), available at https://www.childwelfare.gov/pubPDFs/reunify.pdf.

828, 858, 383 P.3d 492 (2016). Nineteen years later, in 2011, the Washington Legislature passed the WICWA, which was "meant to strengthen Washington's enforcement of the fundamental protections that ICWA guarantees to an Indian child, their parents, and their tribe(s). *Z.L.G.* at 171; RCW 13.38.030. A full twenty-four years after *Crews* was decided, this Court reversed it in part, finding that a correct application of ICWA did not allow for exceptions based on the existing Indian family doctrine. *T.A.W.* at 858.

3. ICWA and WICWA's mandates requiring the provision of "active efforts" are still necessary protections to ensure the best interests of Indian children.

In 2016, the first binding federal regulations concerning ICWA were issued by the Bureau of Indian Affairs, in response to "decisions and policies of state courts that impermissibly lowered the protections of ICWA." ICWA Proceedings, 81 Fed. Reg. 38,782. In describing the need for the regulations, it noted that "(f)or decades, various State courts and agencies have interpreted the Act in different, and sometimes conflicting, ways. This has resulted in different standards being applied to ICWA adjudications across the United States, *contrary to Congress's intent*." *Id.*, emphasis added. These varied approaches have fundamentally and impermissibly lowered the protections of ICWA. *Z.J.G.* at 171.

These realities are reflected in the ongoing disproportionate number of Native children in the Washington State child welfare system. Between 2014-2016, Native American children in Washington were removed from their homes by Child Protective Services at a rate of about seven per 1,000 children, compared to a rate of about 2.5 per 1,000 white children, and 5.4 per 1,000 Black children (the next highest rate). WASHINGTON STATE DEP'T OF CHILDREN, YOUTH, & FAMILIES, WASHINGTON STATE DCYF RACIAL DISPARITY INDICES REPORT 9 (2018). As noted in *Z.J.G.*, these statistics "indicate that continued commitment to the robust application of ICWA and WICWA is needed to address ongoing harms of Indian child removals." *Z.J.G.* at 172.

B. THERE IS NO BASIS IN LAW FOR APPLICATION OF THE FUTILITY DOCTRINE TO ICWA CASES AND EXTENDING THE DOCTRINE WOULD UNDERMINE THE PROTECTIONS CONGRESS GUARANTEED TO INDIAN CHILDREN AND COMMUNITIES.

1. There is no basis in law for the court to relieve the State of its duty to provide active efforts to Indian children's families on a finding that to do so would be futile.

Some courts in Washington State have adopted a futility doctrine in non-ICWA dependency cases, allowing them to relieve the state agency of providing reasonable efforts when the court finds that to make reasonable efforts would have been futile. *In re Welfare of Hall*, 99 Wn.2d 842, 850-51, 664 P.2d 1245 (1983); *In re Parental Rights to K.M.M.*, 186 Wn. 2d at

485, 379 P.3d 75 (2016). Division III recently extended the application of this doctrine to ICWA cases, finding that active efforts are futile where a "parent has a long history of refusing treatment and continuing to refuse treatment." *Matter of D.J.S.*, 12 Wn. App.2d 1, 136, 456 P.3d 820 (Div. 3, 2020), *citing In re Dependency of A.M.*, 106 Wn. App. 123, 136-137, 22 P.3d 828 (2001). *D.J.S.* incorrectly interprets the protections of ICWA and this court should reject its reasoning.

In its analysis in *D.J.S.*, Division III noted that the State of Michigan rejected extending the futility doctrine to ICWA cases. *D.J.S.* at 840. In its opinion, the Michigan high court expressed concern that lower courts would avoid requiring active efforts be made by simply deciding services would be futile. *In re J.L.*, 483 Mich. 300, 326-327, 770 N.W.2d 853 (2009). Division III took exception to this, stating that this fear failed to give due credit to the abilities of trial court judges. *Id.* at 38.[4] However, other state courts have also rejected efforts to carve out an exception to the active efforts mandate, citing concerns of inconsistency in application. *See People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 619 (S.D. 2005) ("ICWA clearly offers no exception to its requirement of 'active efforts'."). In *J.S.B.*, the court noted the capriciousness with which vital family ties

[4] The case before this Court demonstrates the soundness of Michigan Supreme Court's concern. *See* Section C, *infra*.

could be severed if the doctrine was extended to ICWA cases ("ICWA ensures the best interests of Indian children by maintaining their familial, tribal, and cultural ties. It seeks to prevent capricious severance of those ties."). *Id*. at 617.

This Court should reject Division III's approach and require strict adherence to the active efforts mandate. The futility doctrine is a deeply troubling and cynical approach to dependency cases generally, and offensive as applied to ICWA cases.

First, neither ICWA, WICWA, nor the Federal Regulations contain any exception to the mandate that ICWA applies in its entirety to involuntary custody cases involving children who meet the statutory definition of "Indian child". In 1978, when ICWA was passed, Congress provided no exception to the requirement that agencies provide active efforts to reunify the family. 25 U.S.C. §§ 1911-1923. In fact, the House Report recommending passage of ICWA specifically cited the need for equal and consistent application of child welfare standards and service provision for Indian families. H.R. Rep. No. 95-1386, at 10.

In 2011, when WICWA was passed, the Washington State Legislature provided no exception to the requirement that agencies provide active efforts to reunify the family. RCW 13.38.040. This is notable, as WICWA, unlike ICWA, does provide a definition of "active efforts" ("in

any foster care placement… the department or supervising agency *shall make timely and diligent efforts to provide or procure such services*, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services."). RCW 13.38.040(1)(a), emphasis added.

In 2016, when the Bureau of Indian Affairs issued binding regulations in support of ICWA, it included no provisions that excused an agency from providing active efforts to services to reunify the family. *See generally* 25 C.F.R. § 23. The Regulations do, however, expressly reject the judicially created "existing Indian family" doctrine, another attempt at providing an exception to the application of ICWA. 25 C.F.R. § 23.103; ICWA Proceedings, 81 Fed. Reg. 38,815. Additionally, Federal guidelines issued in 1979, 2015, and 2016 also do not note any avenue whereby a court can relieve an agency from its duty to provide active efforts to the family of an Indian child on a finding that to do so would be "futile". *See generally* BIA GUIDELINES.

Because neither ICWA or WICWA, or any of their supporting legal authority, include a futility exception to the mandate to provide "active efforts" to the family of an Indian child, the futility doctrine cannot be extended to ICWA cases, particularly because to do so would undermine the very purpose of the Acts. Articulated in *Z.J.G.*, this court is "bound by

the statutory language and implementing regulations of ICWA and WICWA", and must "interpret these acts to serve their underlying purposes." *Z.J.G.* at 158. Therefore, it was outside of the trial court's authority to have created an exception, and this Court should not affirm the improper exception. *See T.A.W.*, 186 Wn.2d at 851 (providing that the Supreme Court will not create exceptions to ICWA absent express legislative intent).

2. Extending the futility doctrine to ICWA cases would be a violation of the spirit of ICWA and a failure to understand the continuing impacts of federal Indian policy on Native families.

At the passage of ICWA, Congress recognized that hundreds of years of federal Indian policy contributed to the current struggles of some Indian families:

> Congress also recognized that Indian parents sometimes suffered from ''cultural disorientation, a [ ] sense of powerlessness, [and] loss of self-esteem,'' and that these forces ''arise, in large measure from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.'' H.R. Rep. No. 95–1386, at 12. But, Congress concluded, ''agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.'' Id. The ''active efforts'' requirement is one of the primary tools provided in ICWA to address this failure, and *should thus be interpreted in a way that requires substantial and meaningful actions by agencies to reunite Indian children with their families*. The ''active efforts'' requirement is designed primarily to ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible.

ICWA Proceedings, 81 Fed. Reg. 38,790 (emphasis added).

The impact of this country's assault on Native communities has an ongoing influence on Native people and communities, "with scars that stretch from the earliest days of this country to its most recent ones." *Z.J.G.* at 157. As this Court wrote in *Z.J.G.*, ICWA's purpose was "to interrupt state policies that contributed to the large scale and ongoing genocide of Native people, through the removal of children, which was part of assimilationist policies begun in the 1800s to 'Kill the Indian and Save the Man.' *Id.* at 170.

Allowing state agencies to be excused from the mandate to provide active efforts on a finding of futility would be a cynical endorsement of the past practices used by state agencies, which were so egregious that they led to the passage of ICWA. This is true for several reasons. A determination of futility by the court is inherently subjective *and* speculative, thus unlikely to yield uniform results, contrary to Congress's intent. This subjectivity risks the introduction of potential biases coloring decision-making into what is now a simple mandate. The speculative nature of a futility analysis ignores Indian families' ongoing challenges and fears of engaging with a child welfare system, a direct result of past federal Indian policy. The history ICWA's application proves that despite courts' best intentions, the federal government's past policies regarding

Indian families continue to undermine truly unbiased decision-making regarding Indian children's welfare. *See Z.J.G.* at 170-171.

Legal commentators share these concerns. In discussing "gold standard" child welfare practice, one commentator noted the layered and destructive implications for Indian children if the legal system fails to provide active efforts as required by ICWA. Sheri Freemont, "Gold Standard Lawyering for Child Welfare System-Involved Families: Anti-Racism, Compassion, and Humility", *The Guardian*, Volume 42, No. 4 (Winter 2020), available at https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/guardian/2020_december/guardian_2020_v42n04_r6.pdf?fbclid=IwAR0tvx7Xk6YRDHAbbq9S5sByclB8YC7LU7VTreEyRlJQ_Sw6KX5efzhePAC. This commentator noted that "[t]o view parents as solely responsible for their challenges and… perceive (a) lack of commitment or willingness to do what it takes to get their kids back… (is) not only a product of white supremacy culture, but evidence of how grossly uneducated we are as a discipline in human trauma, systemic racism, disabilities, and cultural humility." *Id.* Ms. Freemont goes on to argue that challenging systemic racism in the child welfare context demands that the system acknowledge that Black and Brown families may need more time for healing and recovery to take hold. *Id*.

The National Council of Juvenile and Family Court Judges has also noted the continued need for courts, as the gatekeepers, to enforce compliance with ICWA and the "spirit of the ICWA" by enforcing the delivery of services and supports. National Council of Juvenile and Family Court Judges, Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Courts, 6, (2012) available at http://nrc4tribes.org/files/Improving%20Compliance%20with%20ICWA%20-%20A%20Guide%20for%20Juvenile%20and%20Family%20Courts.pdf.

C. THE COURT HAS A FUNDAMENTAL DUTY TO INTERROGATE STATE AGENCY REPRESENTATIONS OF ACTIVE EFFORTS MADE TO REUNIFY INDIAN FAMILIES.

The day-to-day enforcement of ICWA happens in courts. NAT'L CONF. OF STATE LEGS, *NCSL's Indian Child Welfare Resources*, (Nov. 12, 2019), https://www.ncsl.org/research/human-services/ncsl-state-tribal-institute-intersection-ec-cwp.aspx; *See also* 25 U.S.C. §1912(f); RCW 13.38.040(1)(a)(i); RCW 13.38.130(1). The ICWA Guidelines recommend that a court "inquire about active efforts *at every court hearing* and *actively monitor compliance* with the active efforts requirement." BIA GUIDELINES 43 (emphasis added). Compliance with the requirement to provide active efforts is a legal determination to be

made by the court. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120 (both directing that a court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster placement or termination of parental rights). *See also Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 871-872, 439 P.3d 694 (2019) (noting that while "all cases involving active efforts contain differing facts[,] the underlying legal issue – the adequacy of the Department's efforts – remain the same from case to case"). The Washington State Juvenile Non-Offender Benchbook emphasizes the court's responsibility to inquire into specifics of service provision, to confirm they rise to the level of "active efforts." BENCHBOOK, Ch. 29 § 8a.

A court's failure to critically assess whether active efforts have been made abdicates one of the court's primary roles in Indian child welfare cases: to oversee and ensure that the State meets its statutory duty to provide active efforts to reunify the Indian family. As Judge Leonard Edwards wrote, "[j]udicial oversight is just as critical to implementation of the ICWA and to the requirement that social workers provide active efforts to prevent removal of Indian children from their families and facilitate reunification when they have been removed. Judges must monitor the actions of social workers to ensure that they are following the law." Judge Leonard Edwards (ret.), Defining Active Efforts in the Indian

Child Welfare Act, *The Guardian,* Vol 41, No. 1, Jan/Feb 2019, available at https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/guardian/2019_01_january/guardian_2019_v41n01.pdf.

Unfortunately, the case at bar highlights the dangers that arise for Indian children when courts fail to fulfill this charge. The commissioner in this case believed it "is not the court's role" to "critique how social workers could do better." Clerk's Papers 171. Instead, the court found that because it was "not convinced that anything would have come" from the referrals, to have made active efforts would have been futile.[5] *Id*. at 164-165. This scenario is exactly what the court in Michigan's *In re J.L* case feared would occur: trial courts failing to interrogate the efforts made by state child welfare agencies and excusing failures on the basis that they were "futile". *Id.* at 326-327. Such a result is untenable for a court system charged with enforcing Congress and this State Legislature's Acts designed to protect Indian families. This Court must demand more of this

[5] The lower court's statements also echo past courts' attempts to condition the application of ICWA on proof of the child's "Indian-ness," shifting the burden onto the Indian family. *See* Z.L.G. at 169, *citing* ICWA Proceedings, 81 Fed. Reg. at 38,782. The court's comments reveal its belief that the parent must "convince" the court that "anything would have come" from the referrals, a statement that inherently places a burden on the parent to prove her worthiness to receive active efforts.

state's trial courts and require a robust inquiry of active efforts at every stage of an ICWA case.

CONCLUSION

For the forgoing reasons, Amici requests that the Supreme Court reject the futility doctrine as a basis for the State's failure to provide active efforts in ICWA cases. The Court should further require a robust inquiry by the state trial courts in assessing whether active efforts have been offered to prevent the breakup of the Indian family.

DATED this 28th day of December, 2020.

Respectfully submitted,

UNIVERSITY OF WASHINGTON TRIBAL COURT PUBLIC DEFENSE CLINIC
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on December 28, 2020, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 28th day of December, 2020.

/s/ Stacey Lara
Stacey Lara
Counsel for Amici Curiae

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